No. 785

In the Supreme Court of the United States

OCTOBER TERM, 1954

GEORGE [illegible] CORPORATION,

Petitioner,

vs.

[illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

BRIEF

INDEX

CITATIONS

631366—45——1

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No. 795

GLOBE INDEMNITY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Claims (R. 31–36) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1944 (R. 36). Petitioner's motion for a new trial was overruled on October 2, 1944 (R. 37). The petition for a writ of certiorari was filed on December 29, 1944. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether recovery may be had under a Government construction contract for "additional" work performed, where (1) the contractor failed to appeal to the head of the department, as required by the contract, from a ruling of the contracting officer that such work was required under the contract, and (2) no attempt was made to secure written approval by the head of the department, as required by the contract, of changes in the specifications.

CONTRACT PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set out in the Appendix, pp. 12–15.

STATEMENT

Petitioner was the surety on the performance and payment bond of Peter and A. J. Ellis, Inc. (herein called the contractor), which entered into a contract with the United States on May 12, 1933, to construct part of the steam distribution system of the central heating plant that services public buildings in Washington, D. C. (Fdgs. 2, 3; R. 18). This work involved the construction of three pipe lines between 18th and C Sts., N. W., 19th and C Sts., N. W., the Interior, State, War, Munitions, and Navy Buildings, and the Naval Hospital (Fdgs. 2, 5; R. 18–20). Three-fourths of the construction work, which for the most part consisted of open trench work, was to be done in

close proximity to sewers, and gas, water, and electric mains, and adjacent to, or under, paved streets and sidewalks (Fdg. 5; R. 20).

As the trenches were dug it was necessary to shore up their sides with supports. The contract indicated that subsidence of adjacent soil was to be expected at certain points and that permanent sheet steel piling would be required in such areas (Fdg. 6; R. 20–21). Section 110 of the specifications provided, however, for the removal of all temporary piling and supports as the earth backfill was placed (Fdg. 6; R. 21). Before submitting its bid, the contractor visually examined the route the steam lines were to follow (Fdg. 8; R. 21). However, the contractor discovered, shortly after the work had begun, that at certain locations, the nature of the soil made it impossible to remove the temporary shoring without endangering adjacent structures (Fdg. 10; R. 21). When the contractor brought this to the attention of the government engineers in charge of the project, it was advised to leave the temporary shoring in place and to submit a written statement as to the additional cost (Fdgs. 4, 10, 11; R. 19, 21–22). This was done (Fdg. 11; R. 22) at an expense to the contractor of over $500 (Fdgs. 11, 12; R. 22–25). No written order covering this expenditure, however, was obtained from the contracting officer. Nor was the written approval of the head

of the department or his representative obtained (R. 27, 32–34).[1]

Thereafter, on July 17, 1933, the contractor submitted a proposal covering the increased cost of leaving the temporary sheeting in place, which was forwarded to the Supervising Architect (Fdg. 11; R. 22). In January 1934 the contractor submitted a revised proposal, which was rejected (Fdgs. 12–14; R. 24–26). The contractor was informed of the rejection on May 2, 1934, in a letter which stated that the claim was not legally allowable and referred the contractor to the Comptroller General (Fdg. 14; R. 26–27). No appeal was taken from this decision (Fdg. 14; R. 27).[2] The contractor completed the work and, on April

[1] Article 4 of the contract provides that if, during the progress of the work, the contracting officer finds that the subsurface conditions encountered differ materially from those indicated in the specifications or drawings, he shall, with the written approval of the head of the department or his representative, make such changes in the specifications as are necessary. Any increase in cost consequent thereon is to be adjusted as provided in Article 3. That article provides that any change involving more than $500 shall be approved in writing by the head of the department or his representative; that a claim for adjustment must be asserted within ten days from the date the change is ordered; and that any dispute is to be resolved as provided in Article 15. (See pp. 12–13, *infra*.)

[2] Article 15 of the contract provides that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer or his representative, subject to appeal to the head of the department, whose decision shall be final. (See pp. 13–14, *infra*.)

20, 1935, received final payment without protest (Fdg. 16; R. 29). No reservation was made on the final voucher as to the cost of leaving the timber sheeting in place (Fdg. 16, R. 29). A claim covering that cost was subsequently submitted by the contractor to the General Accounting Office, which denied it (Fdg. 17; R. 29–31).

The petitioner, as surety on the performance and payment bond of the contractor, having been compelled to pay the contractor's creditors a net amount of $19,204.56, brought suit in the Court of Claims to recover that amount (Fdg. 18; R. 31). The Court of Claims held (R. 31–35) that the additional work done was covered by Article 4 of the contract, dealing with changes in the plans and specifications where the subsurface conditions encountered differ from those indicated by the specifications, and that recovery was precluded by the contractor's failure to comply with Articles 3 and 4 of the contract, which require that where extra work is performed because of such changes, the written approval of the head of the department must be secured. Judges Madden and Littleton concurred on the ground that the contractor was foreclosed by its failure to appeal, as required by the contract, from the decision of the contracting officer that in leaving the timber sheeting in place no more was done than the contract required (R. 35–36).

ARGUMENT

We submit that the decision below was correct, on either of the grounds relied upon by the judges of the Court of Claims.

1. Under the express terms of the contract, the contractor's failure to appeal to the head of the department the determination of the contracting officer rejecting its claim for extra compensation for the wooden sheeting left in place forecloses recovery. *United States* v. *Blair,* 321 U. S. 730; *United States* v. *Callahan Walker Co.,* 317 U. S. 56; *United States* v. *John McShain,* 308 U. S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *Plumley* v. *United States,* 226 U. S. 545.

When the contractor discovered, after beginning work under the contract, that in some places it would be impossible to remove the timber supports without jeopardizing the stability of surrounding structures, the question arose as to whether the existing specifications should be changed pursuant to Article 4 of the contract. The letter of May 2, 1934, rejecting the contractor's claim for additional compensation for the wood sheeting left in place when the backfilling was laid, resolved this question against the contractor (Fdg. 14; R. 26–27, 33) on the ground, as the concurring judges below found, that the contractor, in leaving the timber sheeting in place, was doing no more than the contract required—back filling its trenches without damaging adjacent

structures—and was not entitled to an order changing the specifications because of unanticipated subsurface conditions (R. 36). The contractor did not appeal from this determination to the head of the department, as provided by Article 15 of the contract, but completed the work under the contract and accepted, without protest, the Government's check in payment of the balance due under the contract, making no reservation with respect to the extra cost of leaving the temporary timber sheeting in place (Fdgs. 14, 16; R. 27, 29). Not until three months after the acceptance of this check did the contractor renew its claim for additional compensation.

It is settled that the appeals provision in Article 15 of the contract constitutes "the only avenue for relief" (*United States* v. *Callahan Walker Co.*, 317 U. S. 56, 61) available for the settlement of disputes concerning questions arising under Government contracts, and that unless such procedure is followed, no claim for damages may be asserted in the Court of Claims. As was stated in *United States* v. *Blair*, 321 U. S. 730, 735, "Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions," a contractor is "not free to disregard them without due cause." In the absence of a valid excuse for not appealing to the department head pursuant to Article 15, failure to exhaust this administrative

remedy bars recovery. *Bray* v. *United States*, 46 C. Cls. 132, 138–139; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Alliance Construction Co.* v. *United States*, 79 C. Cls. 730, 734; *Horace Williams Co.* v. *United States*, 85 C. Cls. 431, 441; *Silas Mason Co. Inc.* v. *United States*, 90 C. Cls. 266. And, in the absence of such appeal, the contracting officer's determination of fact, necessarily embraced in his conclusion that the claim was not allowable, that the specifications required leaving the shoring in place, is, under the terms of the contract, conclusive upon the contractor in the absence of fraud, bad faith, or such gross error as to imply bad faith, none of which is here claimed to exist. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Ripley* v. *United States*, 223 U. S. 695, 704; *Plumley* v. *United States*, 226 U. S. 545, 547; *United States* v. *Gleason*, 175 U. S. 588; *Kihlberg* v. *United States*, 97 U. S. 398, 400; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *McIntyre* v. *United States*, 44 C. Cls. 448, 452–453; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549, 561; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *Myers* v. *United States*, 101 C. Cls. 41.

2. Even if the contractor's failure to take the appeal required by Article 15 would not bar the claim, petitioner was still properly denied recovery, because the wooden sheeting left in place

as a consequence of the oral advice given by subordinate government officials was not ordered "in the manner required by the contract." *Plumley* v. *United States*, 226 U. S. 545, 547. The machinery for adjusting the contract price set up in Article 3, and made applicable, by reference, to alterations in the contract required by unanticipated subsurface conditions, requires that changes in specifications must have the written approval of the head of the department or his representative. In this case, no written change was ever made in the specifications, or requested; nor was the written approval of the head of the department or of his representative obtained (Fdg. 14; R. 27).

The record is barren of any excuse for the contractor's failure to comply with the requirements of the contract in this respect.[3] The cases cited by petitioner (Pet. 11–15), in which recovery was allowed despite failure to secure the required approval, involved situations where it was either impossible or futile to secure a change order

[3] Petitioner's contention that such a change order could not have been issued, because it was impossible to estimate in advance the increase in the cost of the work (Pet. 15–16), is without merit. Two months after the contract was signed and almost two years before final payment was made on it, the contractor submitted an estimate of the cost of leaving the wood bracing in place which differed but slightly from the revised estimate, submitted 6 months later, upon which the present suit is based (Fdgs. 2, 11, 12, 16; R. 18, 22, 24–25, 29).

as required by the contract.[4] Although the contracting officer in this case eventually ruled that no change order was necessary because leaving the shoring in place was embraced within the terms of the contract, this decision was not made until almost a year after the contractor first concluded that the subsurface conditions encountered differed from those anticipated. Yet in all that time the contractor made no request for a change in the specifications. And no appeal was taken from the decision of the contracting officer. If a request for change of specifications had been made and denied, an appeal could then have been taken to the head of the department (see pp. 7–8, *supra*). Having thus elected to proceed without obtaining orders in the manner provided by the contract, the contractor was properly denied recovery. *Plumley* v. *United States,* 226 U. S. 545, 547; *United States* v. *McShain,* 308 U. S. 512, 520; *Hawkins* v. *United States,* 96 U. S. 689, 697; *Wisconsin Bridge & Iron Co.* v. *United States,* 97 C. Cls. 165;

[4] In *Armstrong and Co.* v. *United States*, 98 C. Cls. 519, upon which petitioner particularly relies (Pet. 16–18), the Court of Claims, with Chief Justice Whaley and Judge Whitaker dissenting and Judge Jones concurring in result only, allowed recovery although no order had been given in writing for the additional expense to which the contractor had been put as a consequence of the substitution by the Government agent of inferior bricks for those which the contractor planned to use. The Court considered this an "Extras" case under Article 5 of the standard Government contract (see p. 13, *infra*), and held the case not governed by Article 3.

Arnold M. Diamond v. *United States,* 98 C. Cls. 428; *Ferris* v. *United States,* 28 C. Cls. 332.

3. In any event, the conclusion below may be supported on a third ground. By accepting without protest the check tendered in full settlement of the Government's liability under the contract, the contractor barred itself and all persons claiming under or through it from making any claims against the Government based upon the work performed in connection with such contract. *Poole Engineering Co.* v. *United States,* 57 C. Cls. 232; *Joice* v. *United States,* 51 C. Cls. 439.[5]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
Special Assistant to the Attorney General.
ABRAHAM J. HARRIS,
CECELIA GOETZ,
Attorneys.

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[5] Petitioner urges (Pet. 18–25) that in any event it is entitled to recover on a *quantum meruit* basis. Since the work upon which the claim is based was performed under an express contract, this doctrine is inapplicable. *Hawkins* v. *United States,* 96 U. S. 689, 697; *Pharr* v. *United States,* 62 C. Cls. 445; *Hampton* v. *United States,* 82 C. Cls. 162; cf. *Klebe* v. *United States,* 263 U. S. 188.